



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 25, 2020

Mark D. Hensley
City Attorney
City of El Segundo
2600 W. Olive Avenue, Suite 500
Burbank, California 91505

Re: Your Request for Informal Assistance
Our File No. I-20-077

Dear Mr. Hensley:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because your questions are general in nature, we are treating your request as one for informal assistance.²

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Under the Act, may El Segundo City Councilmember Scot Nicol take part in governmental decisions amending the City’s Downtown Specific Plan, given that he operates a business and has leased commercial property located in the Downtown Specific Plan area?
2. If Councilmember Nicol, and other councilmembers, are disqualified from the aforementioned decisions under the Act, may a disqualified official take part in the decisions, after a random means of selection, for the purpose of convening a quorum that could not be established without the participation of the disqualified official?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSIONS

1. Without additional details available regarding the underlying projects necessitating amendment of the Downtown Specific Plan, it cannot be determined whether Councilmember Nicol would be permitted to take part in or would be disqualified from those governmental decisions.
2. Regulation 18705 provides the procedure by which a public official may take part in a governmental decision the official would otherwise be disqualified from under the Act, to the extent the official's participation is necessary for convening a quorum.

FACTS AS PRESENTED BY REQUESTER

Scot Nicol has served as a Councilmember for the City of El Segundo since 2018. He is also a licensed real estate agent and maintains an office in the Downtown Specific Plan area of the city. On February 24, 2019, he entered into a five-year, triple-net lease for the office space. Pursuant to the lease, base monthly rent charges increase by 3% each year and subletting is prohibited without the lessor's prior written consent. Because the property expenses—including real estate taxes—are passed through to the tenants as a component of rent, those expenses (and, therefore, the total rent charged to the Councilmember) could increase if the property were sold and reassessed at market value. The lease provides that the premises may be used for a real estate office and for no other purpose.

Over the next several months, the City Council is expected to consider one or more projects that may involve amendments to the Downtown Specific Plan, including amendments that would affect the uses allowable in the Specific Plan area as well as applicable development standards, including, without limitation, parking, height, and minimum setback standards.

There are five members on the El Segundo City Council. Several members have potential financial conflicts of interest with respect to the Downtown Specific Plan amendments due to business interests and/or their ownership of real property in or around the area. If Councilmember Nicol is disqualified due to a conflict of interest, there would not be enough qualified councilmembers to constitute a quorum.

In a follow-up email, you further stated that the projects coming before the City Council are not yet clearly defined, but essentially include rezoning many blocks in the downtown area to potentially increase the allowable height of buildings, reduce parking requirements, and perhaps allow different uses. The City Hall is located in the downtown area and part of the project will look at moving some or all aspects of the City Hall (which currently consists of general administration and fire and police stations) and allowing the current City Hall property to be developed by a private party. From the City staff's perspective this could result in a significant change to the downtown area. It will take months of consulting work to develop detailed proposals and plans and probably years to finalize the process.

ANALYSIS

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(Section 87103(a)-(b).)

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.”

The reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material only if the governmental decision will:

- (1) Change the termination date of the lease;
- (2) Increase or decrease the potential rental value of the property;
- (3) Change the official's actual or legally allowable use of the property; or
- (4) Impact the official's use and enjoyment of the property.

(Regulation 18702.2(c).)

The reasonably foreseeable financial effect on a business entity, which is not a named party or the subject of the decision, is material if the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the entity's annual gross revenues and at least \$10,000. (Regulations 18702.1(a)(2)(A)-(B).) The reasonably foreseeable financial effect is also material if the decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or greater than: (A) \$250,000; or (B) one percent of the entity's annual gross revenues and the change in expenses is at least \$2,500. (Regulation 18702.1(a)(3).)

Additionally, "a public official has a financial interest in any person from whom he or she has received income, including commission income and incentive compensation, aggregating \$500 or more within 12 months prior to the time when the relevant governmental decision is made." (Regulation 18700.1(a)(1).) The sources of commission income in a specific sale or similar transaction include, for a real estate agent:

- The broker and brokerage business entity under whose auspices the agent works;
- The person the agent represents in the transaction; and
- Any person who receives a finder's or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker.

(Regulation 18700.1(c)(2)(C).) Regulation 18702.3 provides the standards for determining the materiality of a reasonably foreseeable financial effect on a source of income.

Over the next several months, the City Council is expected to consider one or more projects that may involve amendments to the Downtown Specific Plan, including amendments that would affect the uses allowable in the Specific Plan area as well as applicable development standards, including, without limitation, parking, height, and minimum setback standards. Part of the project(s) will look at moving some or all aspects of the City Hall (which currently consists of general administration and fire and police stations) and allowing the current City Hall property to be developed by a private party. The underlying projects are not yet clearly defined, but City staff believes the project(s) could result in a significant change to the downtown area.

Without specific decisions related to specific projects, it is not feasible to advise on whether a particular governmental decision would have a reasonably foreseeable, material financial effect on Councilmember Nicol's economic interests. In general, it appears that none of the types of decisions you have identified would change the termination date of Councilmember Nicol's lease. Further, because Councilmember Nicol's lease provides that the premises may be used for a real estate office and for no other purpose, none of the aforementioned types of decisions would change Councilmember Nicol's actual or legally allowable use of the property. However, without specifics as to the projects underlying these decisions, no substantive analysis can be had regarding the potential effect on the rental value of the property, or an impact on Councilmember Nicol's use and enjoyment of the property. For example, if rezoning decisions would ultimately result in construction, with potential effects on noise levels, air pollution, and parking, among other effects, it is possible that the decisions would affect the property's rental value, as well as Councilmember Nicol's use and enjoyment of the property. Rezoning decisions could also lead to a long-term

change in the rental value of the property. Without additional information available at this time, it cannot be determined whether Councilmember Nicol would be disqualified from a particular governmental decision.

For similar reasons, it also is not feasible to determine the extent of the financial impact the governmental decisions at issue would have, if any, on Councilmember Nicol's business entity under Regulation 18702.1 or his sources of income under Regulation 18702.3 without additional details.

In any case, under Regulation 18705, a public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. (Regulation 18705(a).) Regulation 18705 describes the specific steps that a public official must take when the otherwise disqualified official is legally required to take part in a governmental decision. The regulation "shall be construed narrowly" and further shall:

- Not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.
- Not be construed to allow a member of any public agency, who is otherwise disqualified under Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification.
- Require participation by the smallest number of officials with a conflict that are 'legally required' in order for the decision to be made. A random means of selection may be used to select only the number of officials needed. When an official is selected, he or she is selected for the duration of the proceedings in all related matters until his or her participation is no longer legally required, or the need for invoking the exception no longer exists.


(Regulation 18705(c)(1)-(3).) Accordingly, a random means of selection could be used for the purpose of convening a quorum and an otherwise disqualified public official, including Councilmember Nicol, would be permitted to take part in the aforementioned decisions if randomly selected.

You have also inquired, "[i]f Councilmember Nicol is disqualified due to a conflict of interest, and one of the disqualified councilmembers refuses to participate in the random selection process believing his/her participation would be inappropriate, may the other disqualified councilmembers participate in a random selection process with one of them being chosen to complete the requisite quorum?" Generally, the exception for legally required participation exception does not apply unless all disqualified officials take part in the random selection process. (See, e.g., *Heisinger* Advice Letter, No. A-95-333; and *Steele* Advice Letter, No. 05-071.) While we have previously advised that an official who is the actual applicant for a project need not take part in the random selection process (*Whitham* Advice Letter, No. 19-153), the facts provided do not indicate comparable circumstances. Barring additional facts, the legally required participation exception would not apply if a councilmember refused to participate in the random selection process.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel


By: Kevin Cornwall
Counsel, Legal Division

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